IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner*

v.

THE OHIO POWER COMPANY

BRIEF IN OPPOSITION TO MOTION OF THE UNITED STATES FOR LEAVE TO FILE A PETITION FOR REHEARING

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CITATIONS

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I. This Court's Rule 58(4) provides:

> "Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received" [Rule 58(4)].

The motion herein is a request to file a petition for rehearing that is both consecutive and out of time under this Rule; in fact, it is the third effort of the Government to bring this particular case before this Court for review. Apart from other questions presented, this is completely dispositive of the Government's motion (pp. 2 to 13, below).

II. The Government's original petition for certiorari was not filed within the time allowed by law (28 U.S. Code Section 2101 (c)), and therefore it could not be granted by this Court even if the pending motion for leave to file a second petition for rehearing out of time were allowed (pp. 13 to 15, below).

III. Contrary to the Government's contention, there is no conflict between the Court of Claims' decision below and the recent decision of the Court of Appeals for the Second Circuit in *National Lead Co.* v. *Commissioner*, 230 F.2d 161. The Court of Appeals did not reach the question of law decided by the Court of Claims. The controlling fact established in the instant case is that the taxpayer had received a certificate certifying that the facilities listed therein were necessary *in their entirety* to the national defense. The comparable fact in *National Lead* was that "the Board never determined that the facilities . . . were necessary . . . in their entirety". The two decisions are governed by different legal principles because of these essentially different facts (pp. 15 to 22, below).

IV. The *National Lead* decision is not a substantial basis for the motion here, even if such motion were not both consecutive and out of time under this Court's Rules, because the issues presented are now stale and of no importance to the administration of the current revenue laws, the statute having expired in 1945 (pp. 23 to 24, below).

I

To Grant the Motion Would be Contrary to Rule 58(4)

This motion for leave to file a second petition for rehearing of denial of certiorari, made some five months after the time allowed under this Court's Rule 58(4), must be denied in accordance with the unequivocal directive of that Rule. The decision of the Court of Claims was entered on March 1, 1955 (R. 35-37; 131 Ct. Cls. 95, 129 F. Supp. 215), and the mandate for the amount of the money judgment was issued by that court on March 30, 1955 (R. 39). The Government's petition for certiorari in this case was filed on August 12, and denied on October 17, 1955 (350 U.S.

862). Twenty-four days later the Government filed a petition for rehearing, requesting that further consideration of the case be deferred until the decision of *Commissioner* v. *National Lead Co.*, then pending before the Court of Appeals for the Second Circuit. This Court denied that petition for rehearing on December 5, 1955 (350 U.S. 919). Now, fourteen months after the decision of the court below and five months after denial of its petition for rehearing and request that the case be held on the docket, the Government is again attempting to reopen the case in this Court. For the reasons set out below it is respectfully urged that this motion for leave to file a second petition for rehearing five months out of time must be denied.

1. The Government's motion does not refer to Rule 58(4), nor does it mention the 1948 amendment to the Judicial Code included in 28 U.S. Code Section 452. Because of its bearing on the proper interpretation and effect to be given to Rule 58(4), we shall first discuss this important change made in the Judicial Code.

Prior to 1948 this Court as well as the Courts of Appeals acted on the principles laid down in *Bronson* v. *Schulten*, 104 U.S. 410, 415:

> "It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.
>
> "But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them. . . ."

In that year, however, Congress enacted 28 U.S. Code Section 452, which reads:

> "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

"Court" is defined in the preceding section (Section 451) to include the Supreme Court.

That this statute eliminated the significance of the duration or termination of a term of court is beyond dispute. The language was taken over bodily from Rule 6(c) of the Rules of Civil Procedure (H. Rep. No. 308, 80th Cong., 1st Sess., p. A52), where it had been originally adopted to avoid the difficulties which were created by the expiration of the term of court at common law; it had thereafter been amended also "to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules". H. Doc. No. 473, 80th Cong., 1st Sess., p. 50; Moore's *Federal Practice* (2d Ed. 1948), pp. 1446-47.[1]

In the light of this history, it has been suggested that the effect of this statute may even be to deprive the Court of power to grant petitions or motions which are filed out of time. See Wiener, *The Supreme*

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[1] Rule 6(c) as originally adopted referred only to "expiration" of a term of court. After such decisions as *Hill* v. *Hawes*, 320 U.S. 520, 524, had indicated that courts were assuming that the continued existence of the term warranted action which would otherwise have been precluded by time limits imposed by other rules, however, Rule 6(c) was amended to provide specifically that "the continued existence", as well as the expiration of a term of court, does not affect the court's power. See H. Doc. No. 473, *supra*, p. 50. Wiener, *The Supreme Court's New Rules*, 68 Harv. L. Rev. 20, 84-86 (1954).

Court's New Rules, 68 Harv. L. Rev. 20, 85-86 (1954); *cf. R. Simpson & Co.* v. *Commissioner,* 321 U.S. 225. At the least, however, this provision plainly eliminates the duration as well as the termination of the term of court as a justificaton for granting or denying an out of time motion to disturb a final judgment, so that in the absence of a statutory provision prescribing a limit on the time within which action is to be taken with respect to a proceeding in this Court, litigants can rely only on the Court's own Rules.

2. Rule 58(4) thus assumes even more importance when considered in conjunction with the 1948 amendment to the Judicial Code. The explicit language of this Rule that consecutive and out-of-time petitions "will not be received" is further emphasized by the fact that it is new;[2] old Rule 33, adopted in 1947, as well as its predecessors, was silent on successive petitions and petitions out of time.

To grant the Government's motion will be in effect to negate Rule 58(4). The obvious purpose of this Rule is to stress the applicability to the final decisions of this Court of the same policy which lies behind the statutory limitations on the time within which appeals are to be taken:

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands.

[2] "The consecutive petition—the second, third, sometimes up to sixth—presents no problem; the Clerk will not receive them, period . . ." Wiener, *The Supreme Court's New Rules, supra,* at 84 (1954).

> Any other construction of the statute would defeat its purpose. * * * Moreover, in such cases extension of the period for appeal could be limited only by recourse to the doctrine of laches applied in the particular circumstances of each case" (*Matton Steamboat Co., Inc.* v. *Murphy*, 319 U.S. 412, 415).

Properly applied, the Rule is salutary; indeed, deciding matters such as this on the doctrine of laches would be intolerable for both the Courts and litigants before it. Certainly the Rule should be given more effect than as a simple directive to knowledgeable counsel that successive or out-of-time petitions for rehearing, to be acceptable, must be accompanied by a motion for leave to file them. Such a motion, of course, was in fact well known and customarily accompanied all out-of-time petitions, even under the old rules. See Stern & Gressman, *Supreme Court Practice*, 1st Ed., 1950, p. 323.

We do not mean to urge that by adoption of Rule 58(4) and the application of 28 U.S. Code Section 452 this Court has divested itself of discretionary power to entertain untimely petitions for rehearing in all cases. We do urge, however, that in the light of the changes which have been effected in both its Rules and in the applicable statutes this Court should no longer grant consecutive or out-of-time petitions for rehearing on the allegation of a belatedly developed conflict of decisions among the circuits. These changes make the line of cases relied on by the Government in which such petitions for rehearing were granted no longer authoritative. *E.g., Stone* v. *White*, 296 U.S. 550, 596, 298 U.S. 646, 300 U.S. 643. Those

decisions were obviously based on the common law rule of *Bronson* v. *Schulten, supra,* that empowered the Court to alter or vacate its judgment prior to expiration of the term and which forbade such action thereafter, since motions for leave to file petitions for rehearing after expiration of the term were uniformly denied on this ground. *E.g., Art Metal Construction Co.* v. *United States,* 289 U.S. 706; *Hudson & Manhattan R.R.* v. *City of Jersey City,* 323 U.S. 812.

We recognize that, since the enactment of the 1948 amendment to the Judicial Code (but before the adoption in 1954 of Rule 58(4)) this Court has on one occasion granted certiorari on an out-of-time petition for rehearing on the basis of an intervening conflicting decision. *Clark* v. *Manufacturers Trust Co.,* 337 U.S. 953, 338 U.S. 241, 242.[3] It would appear much more significant, however, that since the adoption of Rule 58(4) in 1954 this Court has not in fact on any occasion granted a consecutive or out-of-time petition for rehearing of denial of certiorari,[4] although some 23 such petitions with accompanying motions for leave to file have been docketed and disposed of in that period. In seven of these instances the motions for leave to file petitions for rehearing each alleged, as

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[3] It does not appear that in this instance the 1948 statute was called to the Court's attention or that this question was raised or considered; it therefore "does not establish a construction of the statute." *R. Simpson & Co.* v. *Commissioner, supra,* 321 U.S. at 229.

[4] In one instance, the motion for leave to file a petition for rehearing three days out of time was granted because of unusual circumstances constituting excusable delay, but the petition for rehearing itself was denied. *Born* v. *Laube,* 349 U.S. 932.

here, an intervening conflict.[5] One of these (*Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 349 U.S. 969), is particularly pertinent because there this Court denied the motion for leave to file an out-of-time petition for rehearing of denial of certiorari even though the decision below had been expressly disapproved by an intervening and controlling decision of this Court (*Parissi* v. *Telechron, Inc.*, 349 U.S. 46, 47).

3. The enforcement by the Court of the principles of finality prescribed by its own rules in the light of 28 U.S. Code Section 452 is particularly appropriate in a situation such as this, where the prayer is for only a money judgment and where the final decision of this Court denying certiorari completely terminates the controversy. This is quite different from a motion to correct or otherwise amend a judgment or mandate of this Court in order to correct patent error. That was the situation in *Cahill* v. *New York, New Haven & Hartford RR*, May 14, 1956 and in *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U.S. 336, 350 U.S. 811, in each of which the original judgment of reversal, sent directly to the District Court, was recalled and amended to provide for remand to the appropriate Court of Appeals for further proceedings. In the *Cahill* case this Court drew a plain distinction between such motions and out-of-time petitions for rehearing, even though similar relief had previously been sought by a petition for rehearing in that case.

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[5] *Fraver* v. *Studebaker Corp.*, 348 U.S. 939; *Powell* v. *U. S.*, 348 U.S. 939; *Cowles Publishing Co.* v. *NLRB*, 348 U.S. 960; *Jones* v. *Lykes Bros. Steamship Co.*, 348 U.S. 960; *Lopiparo* v. *U. S.*, 349 U.S. 969; *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 349 U.S. 969; *Zientek* v. *Reading Co.*, 350 U.S. 960.

After noting that its original order was erroneous, it stated:

> "Rule 58(4) bars consecutive and out-of-time petitions for rehearing. The *Boudoin* case, however, concerned a motion to recall a judgment that asked for almost identical relief. Yet, if it had been considered a petition for rehearing it was filed out of time. The grant of the motion in the *Boudoin* case shows that Rule 58(4) does not prohibit motions to correct this kind of error."

Again, in *Florida* ex rel. *Hawkins* v. *Board of Control*, 350 U.S. 413, the Court, instead of granting a second petition for certiorari in a continuing litigation with respect to segregation at a state university, amended and clarified on its own motion the mandate it had issued two years before.

Even out-of-time petitions for rehearing themselves present different questions when the mandate of this Court controls future conduct or the continuing custody of a prisoner. Furthermore, as the *Hawkins* case particularly illustrates, there are additional features of judicial administration to be weighed in dealing with requests for rehearing in litigations which are still in process. In the latter situation an out-of-time petition for rehearing must be considered in the light of the fact that the subsequent proceedings would themselves present an opportunity to bring the matter back to the Court, with full opportunity then for it to modify its earlier decision. Thus, in *Remmer* v. *United States*, 348 U.S. 904, criminal convictions in a so-called "net worth" case had been vacated and remanded by the Court on a narrow ground (347 U.S. 227). An unopposed but delayed petition for rehearing was granted by the Court and the original mandate modified in the light of later decisions of this

Court, without awaiting a second petition for certiorari.[6]

Here, however, unlike cases in which continuing litigation or future conduct is involved, the judgment for a sum of money brought the controversy between the parties finally and definitively to an end. Even in such cases, however, procedures are readily available to this Court to prevent its judgments from becoming final in any instance in which it believes that the interests of justice will be promoted by holding the case on its docket without disposition, whether to await the decision of another court or the happening of some other event. This procedure was recently followed, for example, in *United States* v. *Olympic Radio & Television, Inc.*, 348 U.S. 808, 349 U.S. 232, in which this Court retained a petition for certiorari on its docket without decision for over a year, awaiting a possible conflicting decision of a Court of Appeals (which in fact occurred). See Government's First Petition for Rehearing, filed November 10, 1955, p. 4, n. 1.[7] Where the desirability of awaiting the development of a possible conflict outweighs that of an expeditious final decision, this procedure is always available.

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[6] In effect, the nature of the relief granted in the *Remmer* case made the motion more closely akin to the motion to amend the judgment in the *Cahill* and *Boudoin* cases than to the out-of-time petition for rehearing in the instant case.

[7] See also, *e.g.*, *Mitchell* v. *United States*, October Term 1953 No. 622, petition for certiorari filed March 5, 1954, certiorari denied June 7, 1954 (347 U.S. 1012), petition for rehearing filed within allowable time as extended, July 6, 1954, rehearing and certiorari granted, judgment below vacated and case remanded on January 10, 1955 (348 U.S. 905) for consideration in light of *Holland* v. *United States*, 348 U.S. 121, and other "net worth" cases decided December 6, 1954.

In fact, the Government actually requested that this be done in this particular case, by its first petition for rehearing filed on November 10, 1955. That petition fully set out the possibility of alleged conflict with the then pending case of *Commissioner* v. *National Lead Co.* In effect the Government is now asking this Court to reconsider the determination it made when it denied that request (350 U.S. 919). This plainly it should not do.

4. Sound procedure, as well as the Congressional policy expressed in other pertinent statutes, plainly calls for denial of the Government's attempt to reopen this proceeding at this stage. Had this case arisen in the Tax Court the Court would by statute have lost the power to reopen it when the Government's rehearing time expired under the Rules and its original timely petition for rehearing was denied, since decisions of the Tax Court are by statute made final "upon the denial of a petition for certiorari", which occurs when the rehearing time expires. *R. Simpson & Co.* v. *Commissioner,* 321 U.S. 225. There is no similar statutory provision applicable to the Court of Claims, but this Court should interpret its Rules so as to put all taxpayers on an equal footing if possible, regardless of the judicial route by which their tax liability is finally determined.[8]

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[8] Failure to use the date of denial of a timely petition for rehearing to mark the finality of a decision would create judicial confusion and conflict with Congressional policy in all Court of Claims cases. Title 28 U.S. Code Section 2515(b) provides that the Court of Claims, on motion of the United States, may grant a new trial "within two years after the final disposition of the suit" if it is able to show "that any fraud, wrong, or injustice has been done the United States." The two-year period in cases where certiorari is sought almost certainly now runs from the

5. If under the 1948 amendment to the Judicial Code (28 U.S. Code Section 452) and the new Rules, this Court is now to grant consecutive and out-of-time petitions for rehearing of denial of certiorari in civil actions of this sort on the ground that there has been an intervening conflicting decision, the precedent established is bound to breed uncertainty, confusion and delay. If the Court now decides that this case was not finally determined and closed when the Government's timely petition for rehearing was denied on December 5, 1955, it is hard to see when a litigant who has obtained what purports to be a final judgment may ever be secure in his position.

Prior to the 1948 amendment to the Judicial Code, litigants were on notice that a purportedly final judgment might be reopened during the remainder of the Court's term, and they also knew that if this were not done their judgment was secure when the term ended. Since the enactment of 28 U.S. Code Section 452, however, the termination of the term of court provides no basis for such reliance. Unless a judgment is to be final when it becomes so under the Rules of this Court, there is no basis for saying that it is final on the expiration of the term, or of the next term, or of the term

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date of denial of a timely petition for rehearing or, if none is filed, from 25 days after the denial of certiorari. *Ex Parte Russell*, 13 Wall. 664, 669; *R. Simpson & Co.* v. *Commissioner, supra*. To entertain out-of-time petitions for rehearing would plainly upset the policy of Congress and create confusion as to when the "final disposition" occurs. Moreover, Congress has specified the extraordinary grounds for a reopening, and this Court has held a mistake of law, even when conclusively shown by a later controlling Supreme Court case, is not a statutory ground. *In re District of Columbia*, 180 U.S. 250.

after that. If this case may now be reopened, why should not the Government—or the taxpayer—also be entitled to reopen a denial of certiorari in any similar or related earlier case? *Cf. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (D. C. Cir., 1949), cert. denied 339 U.S. 904.

In addition to eliminating any definitive time of repose for final judgments, a decision of this Court granting the Government's motion would encourage dilatory tactics in the disposition and settlement of decided cases and would encourage procrastination and delay. Although in normal course the judgment here would have been paid within a period of a month or two after December 5, 1955, the Government has steadfastly refused to pay it in the obvious hope that a decision which it could assert to be in conflict might be handed down and that it might then obtain an out of time rehearing in this case on its petition for a writ. If this practice is sanctioned by this Court it can be anticipated that payment of all such judgments will be indefinitely held up wherever the Government considers that there is any possibility of the development of a conflict within the reasonably foreseeable future. Defeated private litigants, too, will be encouraged to adopt similar delaying tactics in the hope that a future conflict may still enable them to salvage their case. Such a rule would destroy rather than promote the sound administration of justice.

II

The Original Petition for a Writ was Filed Out of Time

As was suggested in our original brief in opposition to the Government's August, 1955 petition for certiorari (p. 2, n. 2) such petition cannot in any event be

granted because it was not filed within the time allowed by law. 28 U.S. Code Section 2101(c).

The decision of the Court of Claims which settled all issues upon which recovery depended was entered on March 1, 1955 (R. 35-37, 129 F. Supp. 215). Since there remained only the relatively mechanical computation of the exact amount to be paid, the Court of Claims suspended the entry of judgment "to await the filing by the parties of a stipulation showing the amount due the plaintiff, according to our findings and opinion". The decision of March 1, 1955, was, however, a final judgment under the provisions of Court of Claims Rule 38(c).[9]

The Government's first application for an extension of time within which to file a petition for certiorari was accordingly out of time, since it was not presented to or acted upon by a Justice of this Court until June 17, 1955, some 108 days after entry of the appropriate final judgment. 28 U. S. Code Section 2101(c). Since this Court has recognized that a final judgment on liability entered under Court of Claims Rule 38(c) is the judgment which is reviewable on a timely petition for certiorari (*United States* v. *Caltex (Philippines) Inc.*, 100 F. Supp. 970, 344 U.S. 149), a petition for certiorari which is out of time with respect to the entry of such a judgment cannot be sustained on the theory that

[9] "... where the Court determines that a party is entitled to recover and the amount of the recovery is reserved for further proceedings, the judgment on the question of the right to recover shall be final, subject to proceedings had under Rules 53 [rehearings and new trials] and 54 [relief for clerical mistakes, excusable neglect, etc.]."

it is filed within the permissible time after entry of the Court of Claims' subsequent mandate for the amount of the money judgment. *Federal Trade Commission* v. *Minneapolis-Honeywell*, 344 U.S. 206, 211-217. See also discussion of this question with respect to a similar judgment of the Court of Claims in briefs filed in this Court on petition for certiorari in *United States* v. *Tanner*, October Term, 1955, No. 280, certiorari denied, 350 U.S. 842.

III

There Is No Conflict of Decisions

The recent decision of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161, is in fact distinguishable from the decision below in this case.

The fundamental facts of the instant case and of the *National Lead* case are essentially different. The issues decided by the Court of Claims below and by the Court of Appeals for the Second Circuit are different. Each decision is predicated upon its own facts.

The key to the important differences between these two cases is found in two different bases on which the War Production Board acted in issuing necessity certificates containing a percentage limitation on amortization: (1) When the *capacity* of a proposed facility was in excess of that necessary to national defense, a percentage limitation was placed in the certificate in order to deny the right of accelerated amortization to the excess capacity of the facility (WPB Circular No. 33, Criteria for Preparation of Recommendations for

Necessity Certificates,[10] reprinted in Record on Petition for Certiorari in *United States Graphite Co.* v. *Sawyer*, No. 532, Oct. Term 1949, p. 85). (2) When the proposed facility was found necessary in its entirety to the national defense but it was reasonable to assume it would be useful also after the war, a percentage limitation on amortizable cost was placed in the certificate pursuant to the Board's illegal policy of limiting amortizable cost to the excess cost of war-time construction or acquisition as compared with normal or pre-war cost (WPB Circular No. 33, *supra*, included in part at R. 28-29).

Thus, two distinct types of percentage certificates were issued by the Board, although on their face they may be and often were identical in language. In the instant case, as well as in *Wickes Co.* v. *United States*, 108 F. Supp. 616 (Ct. Cls., 1952), the taxpayers obtained written statements from the certifying agent that the 35 percent of cost limitation contained in their certificates was imposed solely pursuant to the Board's policy of limiting amortization to excess cost of war-time construction where the entire facilities were necessary to the war effort but were presumed to have post-war utility (R. 5-7, 27-29).

In the *National Lead* case, several certificates were involved, containing percentages varying from 35 to

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[10] Paragraph 3 c reads as follows:

"c. When the facility is clearly necessary to the war effort, but its capacity or cost is in excess of that which is necessary for the war effort, the percentage should be determined in such a way as to make no amortization allowance applicable to the excess capacity or cost."

50 percent (23 T.C. 988, at 1003). The record in *National Lead* fails to show what the percentages in those certificates represented. Without a statement from the certifying agent or other evidence as to the meaning of the percentages there is no proof that the Board ever determined that the entire capacity of the facilities was needed in national defense. Therefore, the Second Circuit properly predicated its decision on the fact that "the Board never determined that the facilities in question were necessary to the national defense in their entirety" (230 F. 2d, at p. 165).

In the instant case the fact was established that the Board had "duly certified that all of the items included in the application for a Necessity Certificate with respect to the Tidd project were necessary in the interest of national defense" (R. 8, 27-28, 33). In view of this established fact the Court of Claims was required to determine, under Section 124(f)(1) whether Congress had authorized the taxpayer to amortize the entire cost of facilities certified in their entirety or only the percentage of cost specified in the Board's limitation. If, as contended by the Government in the Court of Claims, Section 124(f)(1) granted the Board the dual authority to certify (1) the necessity of the facilities and (2) the percentage of the cost of those facilities which it might amortize under Section 124, then the taxpayer was not entitled to the additional amortization claimed. If, as contended by the taxpayer, Section 124(f)(1) granted the Board only the single authority to certify the necessity of the facilities and authorized automatically the amortization of the actual entire cost of the necessary facilities, then the taxpayer was entitled as a matter of law to the additional amortization deduction it claimed. The Court

of Claims faced this question and correctly resolved it in favor of the taxpayer.[11]

The Court's decision was nothing more than an application of the long established principle clearly stated in *Dismuke* v. *United States*, 297 U.S. 167, at 172:

> "... [T]he power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

Such decision of the court below in the instant case is not in conflict with the *National Lead* decision because the Second Circuit did not reach that question. That court, having based its decision on the fact that "the Board never determined that the facilities . . . were necessary to the national defense in their entirety," held that it need not pass upon the effect of Section 124(f)(1). Instead, it considered only whether the taxpayer could obtain from the Tax Court an accelerated amortization deduction for the entire cost of facilities never determined to be necessary in their entirety to national defense. The court ruled (230 F.2d at p. 165) (1) that the Tax Court could not "make the determination of necessity entrusted to the Board," and (2) that since the taxpayer had chosen "to accept the benefit of the partial certificate"

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[11] This Court is respectfully referred to the Brief of Respondent in Opposition to Petition for a Writ of Certiorari filed on September 27, 1955, in the case at bar (pp. 13-22) for a summary of the reasons showing the correctness of the decision below.

without protest or challenge of the Board's power for ten years and had relied upon it in constructing the facilities, "it is now bound by its limitations." That the end result of the two decisions is contrary[12] on the essentially different facts is nothing new, and does not create the direct conflict of decisions with which this Court is concerned.

Neither of the legal principles set forth by the Second Circuit can be applied to the instant case; therefore there can be no conflict of decisions.

First, it has been amply demonstrated that the Second Circuit's proposition that no court can make the determination of necessity entrusted to the War Production Board has no application to this case.

Nor does the second proposition set forth by the Second Circuit apply here. The facts of record in the two cases show conclusively that the acceptance of the limited certificates without protest and reliance thereon in undertaking the construction and acquisition of facilities were not present in the instant case. Thus, the principles of estoppel and laches laid down by the Second Circuit cannot be applied.

The facts in *National Lead* disclose that its necessity certificates were applied for and received at a time when the published regulations provided that certificates would not be granted unless they were *applied for and the necessity of the facilities determined* prior to the commencement of construction or the date of

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[12] It is submitted that the Court of Claims in *Allen-Bradley Company* v. *United States*, 133 Ct. Cls. —, April 3, 1956, was referring only to this contrary result when it mentioned "the contrary decision" of the Second Circuit.

acquisition.[13] There, the taxpayer, before commencing construction or acquisition, applied for and received certificates containing percentage limitations on amortizable cost. As the Second Circuit forcefully points out, it accepted those certificates without protest, acted upon them in 1944 and 1945, and raised no question with respect to their correctness until 1954, when it claimed "for the first time . . . that it [was] entitled

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[13] This regulation, promulgated with the approval of the President on October 5, 1943 (8 Fed. Reg. 13824) added to paragraph 3 of the prior regulations, a subparagraph providing as follows:

> "d. The construction, reconstruction, erection, installation, or acquisition of a facility shall not be deemed necessary unless (1) the beginning of the construction, reconstruction, erection, installation, or the date of acquisition of such facility was prior to October 5, 1943; or (2) an application for a Necessity Certificate describing such facility was filed before October 5, 1943; or (3) the Secretary of War or the Secretary of the Navy, in exceptional cases, has determined prior to the beginning of such construction, reconstruction, erection, installation, or the date of such acquisition, that there is a shortage of facilities for a supply required for military or naval uses and that it is to the advantage of the Government that additional facilities for such supply be privately financed."

Executive Order 9406 of December 17, 1943 (8 Fed. Reg. 16955), transferring the certifying authority from the Secretaries of War and Navy to the War Production Board, contained a provision which became a regulation of the War Production Board (8 Fed. Reg. 16964) in the following terms:

> "(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations *unless a determination of necessity is made by the certifying authority prior to the beginning of the construction*, reconstruction, erection, installation or date of acquisition." (Italics supplied)

to amortization of the entire cost of the facilities" (230 F. 2d, at p. 163). On these facts, plus the fact already referred to that the Board did not certify the facilities in their entirety, the Circuit Court concluded (*supra*, p. 165):

> " . . . the taxpayer has forfeited his right to challenge the Board's action . . . Having accepted the certificate it is now bound by its limitations."

In sharp contrast, the taxpayer in the instant case commenced construction of its Tidd Project Emergency Facility in August 1943 (R. 21) before any such regulation was adopted and at a time when the statute (Sec. 124(f)(3)) and the regulations authorized and encouraged taxpayers to go forward with construction and to *apply* for certificates at any time within six months after commencement.[14] After commencing construction in August, and having become obligated by contract for several million dollars for the project, the taxpayer here made timely application for its certificate on November 16, 1943. The certificate was not issued until nearly a year later, on November 9, 1944. Both at the time of application for the certificate and its issuance, the applicable regulations provided that none of the restrictions on certificates of necessity which had been first announced on October 5, 1943, would apply to construction commenced before that date (8 Fed. Reg. 13824, 10/5/43; Exec. Order 9406, 8 Fed. Reg. 16955, 12/17/43, Footnote 13, *supra*).

It had also been assured by the representations appearing in the Congressional Hearings held in con-

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[14] Construction, of course, could not have been commenced without first having obtained from the War Production Board priority certificates for the acquisition of the material necessary to construct the 100,000 kilowatt Tidd Project steam generating facility.

nection with the enactment of Section 124 and by public statements which had been made by the President and other high administration officials that if a taxpayer proceeded to invest its private capital in the construction of an emergency facility it would be entitled to amortize the full cost.[15]

The War Department in 1942, 1943 and 1944 had granted necessity certificates to this taxpayer for four other projects, all of which were begun prior to October 5, 1943. None contained any limitation upon amortizable cost (R. 19-20). Based upon this prior experience and the rights guaranteed in the statute and existing regulations, it started its construction and made its contract obligations under expressed policies which promised it the right to amortize also the entire cost of the Tidd project. After the certificate containing the illegal limitation was finally issued fifteen months subsequent to the commencement of construction, the taxpayer protested to the Board and demanded that the limitation be stricken (R. 6), but by then it was far too late for it to withdraw from completing the emergency facility.

Only when the Second Circuit or some other court, on the same fact situation as was presented in *Ohio Power*, reaches and answers the question decided by the Court of Claims to the contrary will there be a conflict with the *Ohio Power* decision.

[15] Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76 Cong. 3d Sess. (1940), pp. 124-125, 127, 158, 159, 167-168; H.R. Rept. No. 2894, 76th Cong. 3d Sess. (1940), p. 38; Congressional Record, August 29, 1940, p. 11240 (Rep. Boehne), p. 11246 (Rep. Cooper); Joint Hearings before the House Ways and Means Committee and the Senate Finance Committee on Excess Profits Taxation, Amortization, etc., 76th Cong. 3d Sess., August 9-14, 1940, pp. 21, 29, 75-78.

IV

The Issue Is No Longer a Live One

The *National Lead* decision cannot be deemed a substantial intervening circumstance because the issues in both cases are stale and without importance to the administration of the current revenue laws.

The statute involved expired with the World War II excess profits tax law in 1945. In 1950 Congress enacted a new rapid amortization law as a part of the Excess Profits Tax Act of 1950 (Section 124A of the Internal Revenue Code of 1939), in which it added a new clause conferring upon the certifying agency for the first time the dual power to certify both (1) the necessity of the facilities, and (2) the amount of amortizable cost. Thus, a review by this Court will not aid in the administration of current law. See Stern, *Denial of Certiorari Despite a Conflict,* 66 Harv. L. Rev. 465, 466-468. The issue presented for review is "moribund" and "time [will] soon bury the question" (See dissent of Mr. Justice Frankfurter, in *Darr* v. *Burford,* 339 U.S. 200, 227).

Nor is the issue important in terms of pending litigation. Since last August, at our request, the Internal Revenue Service has furnished the names of the eight cases then asserted in its Petition for Certiorari (p. 8) to be pending in the lower courts. Undersigned counsel have examined those cases and find that two of them do not involve percentage certificates of any kind and that they raise an altogether different issue.[16]

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[16] *United States Pipe and Foundry Co.* v. *United States,* Court of Claims No. 245-54, involving a gross amount of $1,314,851.03; *Milton Bradley Co.* v. *United States,* Dist. Ct. for D. of Mass., decided April 3, 1956, involving $2,476.18.

Therefore, of the Government's list of eight, there are now only three undecided cases pending in lower courts including the Tax Court. How many of the 31 cases said to be pending at the administrative level actually involve the percentage amortization issue counsel does not know. In any event the Government has grossly inflated the amount involved by failing to take into account the recapture in later years of a substantial part of the taxes involved through disallowance of depreciation on facilities completely amortized during the war period.

V

Conclusion

Petitioner's Motion for leave to file a second consecutive and untimely petition for rehearing should be denied.

Respectfully submitted,

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